THE SUPREME COURT OF MISSOURI

M. A.

Appellant

vs.

M. S.

Respondent

No. SC86006

Appeal from the St. Louis County Circuit Court
The Honorable Joseph A. Goeke III, Judge
Transferred by the Missouri Court of Appeals, Eastern District

BRIEF OF AMICUS CURIAE JUSTICE FOR CHILDREN

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INTEREST OF AMICUS CURIAE

Justice For Children, a national child advocacy organization, is composed of concerned citizens who share the belief that our community must act together to protect abused and neglected children from further abuse and to defend every child's right to grow up in a safe and loving environment. Justice For Children works together with Children's Protective Services and other such agencies for the welfare of these children, and, when appropriate, intervenes on behalf of children in court or agency actions that have the potential to compound the harmful effects of the abuse they have already suffered.

Since its founding in Houston in May 1987, the accomplishments of Justice For Children have been nationally recognized. The group's achievements have been featured on ABC's Prime Time Live, on the ABC prime-time documentary "Crimes Against Children," a PBS documentary entitled "Boy Crying, Baby Crying," and on Good Morning America, Donahue, and HBO. In its effort to expand its commitment to serve as an advocate for all abused children, Justice For Children now has chapters in eight states and the District of Columbia.

Neither Justice For Children, nor any of its members, nor its pro bono counsel, Armstrong Teasdale, LLP and O'Melveny & Myers, LLP, have any monetary interest in this case.

STATEMENT OF FACTS

The Respondent, M.S., is a convicted child molester. M.S. began to use his adopted daughter, R.S., "as an instrument to satisfy [his] sexual desires" as soon as he met her. Tr. at 59. At the time, she was an infant. Tr. at 15. M.S. sexually molested his daughter at least six times during the first eighteen months of her life. Tr. at 58-61. Each time that he molested his young daughter, his young son, J.S. was in the house. Tr. at 80.

M.S. has been a child molester for most, if not all, of his adult life. When he was a teenager, he sexually molested his cousin, who was two or three years old at the time. Tr. at 65-67, 207-208, 480.

M.S. is an unrepentant child molester. In 1992, M.S. confessed to his pastor that he had sexually abused his young daughter. Tr. at 18, 486. At his pastor's behest and with his pastor's assistance, M.S. informed his then-wife M.A.,[1] of the molestation. Tr. at 486. M.S. subsequently molested his daughter two more times. Tr. at 487. M.A. divorced M.S. because he molested their daughter. Tr. at 488.

By his own admission, M.S. is still a child molester. M.S. concedes that he is not cured of his pedophilia. Tr. at 96-97. One of the expert witnesses who testified in the circuit court proceeding, Dr. Rohan,[2] has been involved with this case for several years

[1] M.A. married S.A. in 1998. Tr. at 465-66, 618.

[2] Dr. Rohan is a licensed psychologist in Missouri and Illinois, has taught psychology in post-graduate programs for 15 years, is a staff member at several hospitals, and has

by agreement of the parties and with approval of the circuit court. Tr. at 290-91. Dr. Rohan testified that, in his professional opinion, M.S. "is not rehabilitated as a sexual offender." Tr. at 308. When pressed on the veracity of his opinion, Dr. Rohan testified that, on a scale of one to ten, his opinion was "likely at a ten." Dr. Rohan described M.S. as "impulsive, … at risk for having poor impulse control, … [unaware of] the pattern of his deviant sexual behavior…. And he is at risk for behaving in ways that are inappropriate." Tr. at 332-33. Another witness, Ms. Clark,[3] reported that M.S. would be at risk molesting R.S. if the two went to a dark movie theater, or if R.S. acted "clingy" or "overly affectionate." Ex. 6 at 85; Ex. 6 at 90. Yet another witness, Ms. Milligan, acted as supervisor of visits between M.S. and his children. Tr. at 581-582. She testified that both of M.S.'s children appeared to be afraid of M.S. Ms. Milligan testified that both R.S. and J.S. appeared uncomfortable when M.S. asked R.S.:

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extensive experience and current involvement in psychological "testing and measurement." Tr. at 282-86.

[3] Ms. Clark is the owner and operator of the Behavioral Science Institute. Ex. 6 at 7. She has worked with sex offenders since 1982, and she has provided expert testimony "[t]housands of times." Ex. 6 at 8. M.S. was ordered to participate in treatment at the Behavioral Science Institute as a condition of his probation. Ex. 6 at 9-10. It took M.S. six years to complete the program. This is longest amount of time it has taken any of the approximately 7,000 sex offenders that Ms. Clark has treated to complete the program. Ex. 6 at 16-20.

> [W]ouldn't it be nice if you and I just did a visit together like daddy and his daughter on a date?

Tr. at 588-89. In another instance, M.S. confided to Ms. Milligan that he could not guarantee that he would not molest R.S. again. Tr. at 590-592.

M.S.'s sexual abuse has severely damaged R.S. R.S.'s therapist has informed Dr. Rohan that R.S. is emotionally immature. Tr. at 325, 438. Dr. Rohan testified that R.S. is "vulnerable" and that "she would be easily misled and … persuaded to make poor judgments." Tr. at 334. Dr. Rohan further states that R.S.'s psychological problems are "substantial." Tr. at 336. R.S.'s court appointed guardian ad litem, Mr. Dunlop, described R.S. as "fragile." Tr. at 690.

The circuit court permitted unsupervised visitation with both R.S. and J.S. over M.A.'s objection and contingent on the parties informing R.S. that M.S. had abused her. Circuit Court Op. at 5, 8-9. The circuit court held that M.S.'s current wife, D.S., could supervise M.S.'s visitation with R.S.[4] Circuit Court Op. at 8-9.

M.A. appealed from that judgment, contending that the trial court erred in not terminating M.S.'s visitation pursuant to § 452.400.1, and in giving M.S. unsupervised visitation of J.S. M.A. also alleged that it was error to declare that supervised visitation of R.S. should be eliminated after R.S. was informed of M.S.'s molestation of her as an infant and toddler.

The court of appeals reversed the trial court's denial of M.A.'s motions seeking

[4] D.S. did not testify in the case.

termination of visitation with R.S., which was "clearly preclude[d]" under § 452.400.1. *In re: the Marriage of M.A. & M.S.*, No. ED 82018, 2004 Mo. App. LEXIS 679, at *13 (May 11, 2004). However, "because of the general interest and importance of the question of whether section 452.400.1 applies in modification proceedings," the court of appeals transferred the question to this court. *Id.*

POINTS RELIED ON

I.

The language of section 452.400 clearly directs courts to deny visitation to parents guilty of a felony violation of Chapter 566.

§ 452.400, Mo. Rev. Stat.

Hoskins v. Box, 54 S.W.3d 736 (Mo. App. W.D. 2001)

Kearney Special Rd. Dist. v. County of Clay, 863 S.W.2d 841 (Mo. banc 1993)

II.

Applying the chapter 566 limitation to modification proceedings gives effect to the intent of the legislature by addressing the evil it intended to cure.

§ 425.400, Mo. Rev. Stat.

Hagan v. Dir. of Revenue, 968 S.W.2d 704 (Mo. banc 1998)

Hoskins v. Box, 54 S.W.3d 736 (Mo. App. W.D. 2001)

Lewis v. Gibbons, 80 S.W.3d 461 (Mo. banc 2002)

Wilson v. Dir. of Revenue, 873 S.W.2d 328 (Mo. App. E.D. 1994)

III.

The interpretation advanced by the respondent would give rise to absurd results and should therefore be rejected.

§ 452.400, Mo. Rev. Stat.

In re Beyersdorfer, 59 S.W.3d 523 (Mo. banc 2001)

Racherbaumer v. Racherbaumer, 844 S.W.2d 502 (Mo. App. E.D. 1992)

State v. Blocker, No. SC 85704, 2004 Mo. LEXIS 65 (Mo. May 11, 2004)

Stirling v. Maxwell, 45 S.W.3d 914 (Mo. App. W.D. 2001)

ARGUMENT

I. THE LANGUAGE OF SECTION 452.400 CLEARLY DIRECTS COURTS TO DENY VISITATION TO PARENTS GUILTY OF A FELONY VIOLATION OF CHAPTER 566.

§ 452.400.1 Mo. Rev. Stat. states that:

> The court shall not grant visitation to the parent not granted custody if such parent has been found guilty of or pled guilty to a felony violation of chapter 566, RSMo, when the child was the victim, or a violation of chapter 568, RSMo,….

The Missouri legislature directed courts to bar convicted sex offenders from visitation with their children. The circuit court erroneously interpreted this statute to apply only to original custody proceedings and not to modification proceedings. The circuit court's ruling should be reversed.

The "primary rule" of statutory construction is to ascertain the intent of the legislature and to "give effect to the intent" of the legislature. *Lewis v. Gibbons*, 80 S.W.3d. 461, 465 (Mo. banc 2002). A court should "consider the words in their plain and ordinary meaning." *Id.*; *see also Ports Petroleum Co. v. Nixon*, 37 S.W.3d 237, 240 (Mo. banc 2001).

The legislature acted decisively in creating an exception to the general rule that "a parent not granted custody of the child is entitled to reasonable visitation rights." § 452.400.1, Mo. Rev. Stat. (2000). The legislature expressly determined that a court

"shall not grant visitation" where a parent "has been found guilty of or pled guilty to a felony violation of chapter 566." § 452.400.1, Mo. Rev. Stat. (1995). This restriction bars trial courts from granting visitation rights to parents who have been found guilty of the sexual molestation of their children.

The plain and ordinary meaning of "shall not grant visitation" compels the mandatory denial of visitation rights for parents guilty of child abuse. *See, e.g., Kearney Special Rd. Dist. v. County of Clay*, 863 S.W.2d 841, 842-43 (Mo. banc 1993) (determining that the legislative choice of the word "shall" "makes clear that action … is mandatory"). So read, this prohibition extends to both original and modification proceedings. *Hoskins v. Box*, 54 S.W.3d 736 (Mo. App. W.D. 2001) (applying the section 452.400.1 restriction in a modification proceeding). As this court cautioned, "[w]here the legislature has not created an exception, [the] Court should not invent one." *Six Flags Theme Park v. Dir. of Revenue*, 102 S.W.3d 526, 530 (Mo. banc 2003). Therefore, courts lack the authority to grant visitation rights to a parent who has pled guilty to felony child abuse regardless of the matter's procedural posture.

A legislative intent to cabin the restriction in section 452.400.1 to original proceedings is hardly evident from the language. Indeed, the legislature made the express determination in 452.400.1 that it is *never* in a child's best interest to be forced to endure visitation with the parent who sexually abused them. Therefore, the Court cannot interpret the expansive restriction set forth in section 452.400.1 as inapplicable to section

452.400.2.[5]

II. APPLYING THE CHAPTER 566 LIMITATION TO MODIFICATION PROCEEDINGS GIVES EFFECT TO THE INTENT OF THE LEGISLATURE BY ADDRESSING THE EVIL IT INTENDED TO CURE.

Where the legislature has enacted a broad remedial measure, a court should not frustrate the purpose of that provision through a narrow interpretation that is not clearly supported by the text. *Wilson v. Dir. of Revenue*, 873 S.W.2d 328, 329 (Mo. App. E.D. 1994) (holding that "[a] statute must not be interpreted narrowly if such an interpretation would defeat the purpose of the statute"). The prohibition in section 452.400.1 is clearly a remedial measure designed to protect children from sexual abuse and psychological trauma. *Hagan v. Dir. of Revenue*, 968 S.W.2d 704, 706 (Mo. banc 1998) (defining a remedial statute as "a statute enacted for the protection of life and property and in the interest of public welfare"). Remedial statutes are to be afforded a liberal construction "in order to accomplish the greatest public good." *Hagan*, 968 S.W.2d at 706 (quoting *City of St. Louis v. Carpenter*, 341 S.W.2d 786, 788 (Mo. 1961)). In light of this principle, the Court should reject any interpretation of 452.400 that unduly limits the

[5] "The Court may modify an order granting or denying visitation rights whenever modification would serve the interests of the child, but the court shall not restrict a parent's visitation rights unless it finds that the visitation would endanger the child's physical health or impair his emotional development." § 452.400.2 Mo. Rev. Stat. (2000).

scope of the protection it affords the children of Missouri. *See Lewis*, 80 S.W.3d at 465 (holding that "[t]he construction of statutes is not to be hyper-technical, but instead is to be 'reasonable and logical and [to] give meaning to the statutes'") (citation omitted).

Instead, the Court should "construe the statute in light of the purposes the legislature intended to accomplish and the evils it intended to cure." *Wilson*, 873 S.W.2d at 329. The evil that the legislature sought to cure in 452.400 is clear: children who were victimized by one of their parents were being forced to endure visitation with the very person who abused them, thereby compounding the damage to the child victim's well-being. By enacting 452.400, the Missouri legislature determined that it is never in a child's best interest to be in the charge of anyone, even a parent, when that person has sexually abused the child. *See Hoskins*, 54 S.W.3d at 741 (applying the 452.400.1 restriction to find that, in a 425.400.2 modification proceeding, visitation "could not be granted by the court").

III. THE INTERPRETATION ADVANCED BY THE RESPONDENT WOULD GIVE RISE TO ABSURD RESULTS AND SHOULD THEREFORE BE REJECTED.

"[I]f the plain language of a statute creates an ambiguity, the statute will be construed to avoid unreasonable or absurd results." *State v. Blocker*, No. SC 85704, 2004 Mo. LEXIS 65, at *5 (May 11, 2004); *In re Beyersdorfer*, 59 S.W.3d 523, 526 (Mo. banc 2001); *see also State ex rel. Maryland Heights Fire Prot. Dist. v. Campbell,* 736 S.W.2d 383, 387 (Mo. banc 1987) (noting that courts look beyond the plain language of a statute

"when the meaning is ambiguous or would lead to an illogical result defeating the purpose of the legislature"). The interpretation of 452.400 advanced by the respondent leads inevitably to an absurd result and should therefore be rejected.

The circuit court conceded that a court has no power to grant visitation rights in an original dissolution proceeding to a parent guilty of a felony under chapter 566. Circuit Court Op. at 5-6. However, the circuit court held that anytime an original proceeding is followed by a modification proceeding, the only applicable standard governing the court's decision is whether modification serves the best interests of the child. Circuit Court Op. at 5-6. Following this reasoning, the circuit court held that the absolute bar on visitation set forth in 452.400.1 is inapplicable. Such an interpretation is illogical and absurd.

If respondent's view is accepted, a convicted felon who would be absolutely barred from visitation if he made the request during an original custody proceeding could make the same request in a subsequent modification proceeding and be granted visitation under the vastly more favorable "best interest" standard. It is as unjust to deny a child the protection of section 452.400 merely because one stage of a custody proceeding has come to a close and another has begun as it is "unjust to provide the security of the child support laws to one . . . child but not another simply because of the period in time their parents were divorced." *Racherbaumer v. Racherbaumer*, 844 S.W.2d 502, 504 (Mo. App. E.D. 1992).

The legislative scheme advanced by respondent is not only illogical, it also fatally undermines the purpose of the legislature in amending section 452.400. The legislature

expressly instructs that parents guilty of a felony under chapter 566 "shall not" be granted visitation rights. § 452.400.1, Mo. Rev. Stat. (2000). If, at the modification stage, a court is free to grant visitation wherever that court determines that modification of visitation arrangements "would serve the best interests of the child," section 452.400.1 would have no force. Accordingly, the Court should reject the interpretation advanced by the respondent in favor of one that does not give rise to absurd results.

IV. THE CIRCUIT COURT'S DECISION IS CONTRARY TO SOUND PUBLIC POLICY.

The Missouri legislature enacted the protective provision of section 452.400 to shield Missouri's children from the physical and mental harm caused by parental sexual abuse. By categorically denying visitation to parents guilty of abusing their children, section 452.400 protects abused children from the threat of future offenses and from the psychological damage that will likely result from entrusting children to the supervision of parents that have already violated the familial relationship.

The state has a "strong interest in protecting children," particularly children who have already been subjected to felony sexual assault. *State v. Wright*, 751 S.W.2d 48, 52 (Mo. banc 1988) (denying a challenge to the admission of hearsay statements of a victim of felony sexual assault, in part because of the state's interest in protecting children from sexual abuse). The United States Supreme Court has found that "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *New York v. Ferber*, 458 U.S. 747, 757 (1982). The state's

interests in protecting children from the abuse addressed by 452.400.1 are manifold. The state has an interest in preventing physical and psychological violence; fostering the upbringing of productive and well-adjusted citizens; upholding commonly held community standards; and attending to abuse at an early stage, thereby avoiding some of the state-borne costs of medical and psychological care. *See, e.g.*, *Prince v. Mass.*, 321 U.S. 158, 168 (1944) (observing that a "democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies"); *People v. Huddleston*, No. 96367, 2004 Ill. LEXIS 980, at *44 (Ill. June 4, 2004) (remarking that "[b]eyond the compassion one must feel for these innocent victims [of child sexual abuse], pragmatism dictates a recognition that the victim's problems are likely to become society's problems" including "substance abuse, dangerous sexual behaviors or dysfunction, inability to relate to others on an interpersonal level, and psychiatric illness").

The protective provision of section 452.400 is consistent with the general scheme of visitation and custody law, which recognizes that the interests of parents must be subordinated to the best interests of children. *See generally* Chapter 210, Mo. Rev. Stat.; Chapter 452, Mo. Rev. Stat.; Chapter 454, Mo. Rev. Stat.; Chapter 455, Mo. Rev. Stat. Because of the unique nature of visitation and custody law, section 452.400 must be distinguished from a punitive criminal statute. When construing a punitive criminal statute, a court balances the welfare of a child victim against the rights of a criminal defendant. In section 452.400, the Missouri legislature determined that the interests of abused children are best served by a blanket prohibition on visitation rights for the

parents who have committed the abuse.

In light of their vulnerability and the risk of recidivism posed by the parents who abused them, victims of parental sexual abuse merit special protection. Sex offenders pose a uniquely grave risk of re-offending. *See McKune v. Lile*, 536 U.S. 24, 34 (2002) (expressing concern at sex offender's "frightening and high risk of recidivism"); *Smith v. Doe*, 538 U.S. 84, 103 (2003) (it is rational to "conclude that a conviction for a sex offense provides evidence of substantial risk of recidivism" in light of "grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class"). Parents exert authority, control, and influence over their children. Indeed, the power imbalance inherent in the parent-child relationship is precisely what compounds the risk of recidivism. Like R.S., many if not all victims of parental sexual abuse are "vulnerable, … easily misled and … persuaded to make poor judgments." Tr. at 334. Therefore, by affording parents who have sexually abused their children the opportunity to visit their victims, courts expose these child victims to almost certain future harm.

Even if the abusive parent does not reoffend, the damage to the psychological well-being of a child victim can be both substantial and irreversible. To grant visitation to an abusive parent is to place a unique burden on the child victim of parental sexual abuse. Unlike victims of other crimes, a victim of parental sexual abuse would be placed under the authority of the perpetrator if the construction advanced by the circuit court is adopted. No victim should be compelled to spend time with the person who violated them, regardless of biological ties. Sexual abuse such as rape is, "[s]hort of

homicide…the 'ultimate violation of self.'" *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (citation omitted). Psychological problems arising out of child sexual abuse include depression, insomnia, sleep disturbances, nightmares, compulsive masturbation, loss of toilet training, sudden school failure, and unprovoked crying. *See* Melissa Meister, Note: *Murdering Innocence: The Constitutionality of Capital Child Rape Statutes*, 45 Ariz. L. Rev. 197, 208-09 (2003). Placing abused children in the care of their abusers can intensify the "devastating and long-term physical, emotional, and mental trauma" caused by the abuse. *Id.* at 208. The Missouri legislature elected to completely deny visitation to sex offenders guilty of abusing their children precisely to guard against these harms. To limit the absolute bar on visitation set forth in section 452.400.1 to original proceedings would eviscerate the restriction in direct contravention of the will of the legislature.

A judicial placement of child victims such as R.S. and J.S. in harm's way makes no sense when considered in the context of Missouri's legislative scheme. Missouri recognizes the danger that sex offenders pose to the community at large. The Missouri legislature requires individuals guilty of certain enumerated offenses to register with the state so that members of the community can be on notice that a sex offender is in their midst. This registration requirement also affords members of the community the opportunity to plan their activities to avoid these particularly reprehensible criminals. *See* §§ 589.400 - 589.425, Mo. Rev. Stat. The notion that the Missouri legislature could find the community at large to be worthy of protection from sex offenders, and at the same time find the victims of sexual abuse unworthy of protection from their own abuser

defies reason. Because the decisions of the state legislature are presumed reasonable, the Court must reject the respondent's interpretation of section 452.400. *Brown Group, Inc. v. Admin. Hearing Comm'n*, 649 S.W.2d 874, 878 (Mo. banc 1983) (stating that "[i]n construing statutes it must be presumed that the legislature intended a logical and reasonable result with substantive effect").

V. CONCLUSION

For the reasons set forth in this brief, the Court should answer the question transferred to it by the court of appeals in the affirmative and find that the circuit court's narrow reading of section 452.400 is illogical, contrary to legislative intent, and would lead to absurd results.

Respectfully submitted by,

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This brief complies with the requirements of Mo. R. Civ. P. 84.04, 84.05, and 84.06. The brief contains 4,267 words as determined by the software application Microsoft Word. The floppy disk filed with this brief bears a copy of the brief and has been scanned for viruses and is virus-free.

One copy of this brief and one floppy disk bearing a copy of the brief were sent by first class mail on June 30, 2004, to:

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